STATE OF MICHIGAN

COURT OF APPEALS

BIDGROUP, L.L.C., and NEARER DANIEL SWANNIGAN, JR.,

Plaintiffs-Appellants,

v

GKN SINTER METALS, INC., and DONALD J. SPENCE, JR.,

Defendants-Appellees,

and

GENERAL MOTORS CORPORATION and MARK FISCHER,

Defendants.

UNPUBLISHED
January 23, 2007

No. 271288
Oakland Circuit Court
LC No. 05-067207-CK

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiffs BidGroup, L.L.C., and Nearer Daniel Swannigan, Jr., appeal as of right from the trial court's order granting summary disposition to defendants GKN Sinter Metals, Inc., and Donald J. Spence, Jr. We affirm.

Plaintiff BidGroup, through its chief executive officer, plaintiff Nearer Swannigan, Jr., entered into a letter of intent (LOI) with defendant GKN and GKN's president, defendant Donald Spence, Jr., regarding BidGroup's proposed purchase of GKN's auto parts production plant in Gallipolis, Ohio. The LOI indicated that the parties would work to reach a "definitive agreement" and outlined proposed terms for an agreement, but indicated that the provisions of the LOI were not binding, except for those addressing confidentiality and exclusivity. Paragraph 8 of the LOI provided that "except as otherwise agreed, each of the parties will bear its own expenses relating to the proposed Transaction." Paragraph 12 provided that

> [u]nless sooner terminated by the mutual agreement of the parties hereto, this letter shall terminate on the earlier to occur of (a) by written notice at the option of either Purchaser [plaintiff BidGroup] or the Company [defendant GKN Sinter]; (b) the execution of the Definitive Agreement; or (c) the failure of Purchaser to

> deliver a commitment letter(s) evidencing proposed financing by August 9, 2004. Following the termination of this LOI, no party hereto shall have further liability or obligation hereunder to the other party; provided that the foregoing shall not relieve any party from liability for its breach of any binding provision of this letter.

The parties engaged in negotiations to arrive at a "definitive agreement," but were unable to come to agreement. In December 2004, defendants provided written notification that they were terminating the LOI.

Plaintiffs subsequently brought this action to recover their financial losses arising from the failed attempt to purchase GKN's production plant. Plaintiffs alleged separate counts seeking recovery under theories of promissory estoppel, unjust enrichment, and quantum meruit. Defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (10). The trial court found no indication that defendant Spence acted personally or outside his capacity as president of GKN. The court further found that the LOI was a binding contract that allowed either side to terminate the agreement without liability, and expressly provided that "each of the parties will bear its own expenses relating to the proposed Transaction." Because there was a contract that covered the subject matter of plaintiffs' complaint, the court concluded that plaintiffs' equitable claims failed as a matter of law.

This Court reviews the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is appropriate under MCR 2.116(C)(8) if a plaintiff fails to state a claim on which relief may be granted. *Id.* Summary disposition may be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs argue that the trial court should have declined to allow defendants to rely on the termination provision of the LOI and the provision stating, "each of the parties will bear its own expenses relating to the proposed Transaction." We disagree.

Contrary to what plaintiffs argue, a "letter of intent may be characterized as an agreement to agree at a later date and is as valid as any other contract." *Zander v Ogihara Corp*, 213 Mich App 438, 442; 540 NW2d 702 (1995). The LOI outlines proposed terms and conditions for the acquisition of defendants' production plant, but clearly provides that neither party would be bound by those terms without a definitive agreement. The LOI also clearly indicates that either party would be permitted to terminate the LOI upon written notice, and that, "except as otherwise agreed, each of the parties will bear its own expenses relating to the transaction." It is undisputed that defendants provided plaintiffs with written notice that they were terminating the LOI. Plaintiffs did not present any evidence, nor do they argue, that defendants otherwise agreed to compensate plaintiffs for plaintiffs' expenses relating to the transaction.

Plaintiffs assert that the LOI terminated by its own terms on August 9, 2004, because plaintiffs failed to present a financing commitment letter by that date. The only evidence cited by plaintiffs in support of this claim is Swannigan's affidavit. That affidavit contains 44 paragraphs and plaintiffs do not identify the paragraph that allegedly supports their claim that a financing commitment letter was never obtained. A review of the affidavit discloses that the only paragraph that addresses financing is paragraph 37, wherein Swannigan averred:

> I was committed to close the transaction and worked diligently toward that end. I obtained a financing commitment from Fifth Third Bank.

Thus, the evidence does not support plaintiffs' claim that the LOI terminated by its own terms on August 9, 2004. Additionally, it is undisputed that the parties continued to negotiate consistent with the LOI after August 9, 2004.

Plaintiffs' argument that the LOI does not prevent them from seeking recovery for their expenses outside the LOI, under various equitable theories, ignores the clear and unambiguous language of the LOI regarding termination and expenses. Contracts are to be construed in their entirety, *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000), and effect given to every word or phrase as far as practicable, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). Thus, construing the LOI as a whole, and giving effect to each provision, there is no basis for plaintiffs to claim that they may recover their expenses relating to the transaction from defendants. Under plaintiffs' reasoning, either party could be penalized for failing to complete the sale, which is clearly contrary to the clear and unambiguous language of the LOI. The trial court properly recognized that where an express contract addresses the pertinent subject matter, the law will not recognize an implied contract for unjust enrichment, *Liggett Restaurant Group v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003), recovery in quantum meruit, *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 716; 376 NW2d 392 (1985), or recovery under a theory of promissory estoppel, *Advanced Plastics Corp v White Consolidated Industries*, 828 F Supp 484, 491 (ED Mich, 1993).

Furthermore, even if the provisions of the LOI relating to termination and expenses are not considered binding, we agree with the trial court that plaintiffs still are unable to establish a right to recovery under their various equitable theories of relief.

Plaintiffs' promissory estoppel claim is predicated on their assertion that defendants promised to sell the Gallipolis production plant. As explained in *State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 90, p 242:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

"A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Id.* at 85, quoting 1 Restatement Contracts, 2d, § 2, p 8. "To support a claim of estoppel, a promise must be definite and clear." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). "The doctrine of estoppel should be applied only where the facts are unquestionable and the wrong to be prevented undoubted." *Barber v SMH*, 202 Mich App 366, 376; 509 NW2d 791 (1993).

In this case, even if the LOI was not binding, as plaintiffs assert, it is evidence of their understanding. Swannigan admitted in his deposition that he was aware that either party could terminate the LOI at any time without liability. Thus, even if the LOI is not binding, it provides the context for the parties' negotiations and expectations. We agree with the trial court that, in light of the LOI, any alleged promise relating to the proposed acquisition "was not clear and definite but was qualified and conditioned and not a basis for a promissory estoppel claim."

"To sustain a claim for unjust enrichment, plaintiff[s] needed to show that defendants received a benefit from plaintiff[s] and that an inequity resulted to plaintiff[s] as a consequence of defendants' retention of that benefit." *Liggett Restaurant Group, supra* at 137. In this case, plaintiffs' efforts were intended primarily for their own benefit as a potential purchaser, not to benefit defendants. In this circumstance, no inequity arises from any incidental benefit that may have been conferred on defendants. Furthermore, plaintiffs did not present any evidence that they reasonably expected to be paid for their efforts. See *Shree Ganesh, Inc v Days Inns Worldwide, Inc*, 192 F Supp 2d 774, 785 (ND Ohio, 2002). Thus, the trial court did not err in dismissing this claim.

"The doctrine of quantum meruit allows a party to recover the reasonable value of services rendered." *Kamalnath v Mercy Mem Hosp*, 194 Mich App 543, 551; 487 NW2d 499 (1992). Under this doctrine, a contract may be implied in circumstances where "one engages or accepts beneficial services of another for which compensation is customarily made and naturally anticipated." *Comber Tool & Mold Engineering, Inc v Gen Motors Corp*, 853 F Supp 238, 242 (ED Mich, 1993). In this case, even if the LOI is not a binding agreement, it is evidence of the value placed on plaintiffs' services by the parties. See *Kamalnath, supra* at 551. As the trial court observed, "[t]he efforts that Swannigan undertook were part of his own due diligence and for his own benefit as potential purchaser, not for the Defendants." It is apparent from the LOI that, during the time negotiations were ongoing, the parties did not intend to compensate plaintiffs for any of the work that Swannigan did to further negotiations and to enter into agreements that might benefit GKN. Plaintiffs expected that their compensation for Swannigan's work would be their successful purchase of GKN, but there was no guarantee that the transaction would go through, so Swannigan could not have "naturally anticipated" that he would be paid. Therefore, the trial court did not err in dismissing this claim.

Finally, plaintiffs argue that defendant Spence was not entitled to summary disposition because, as an agent and officer of GKN, he may be liable for torts that he personally commits. *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005), lv gtd 474 Mich 1132 (2005). We find no merit to this issue. Plaintiffs' complaint does not allege any tort claim against defendant Spence. The only claim in which defendant Spence is named is the promissory estoppel claim. As previously discussed, the trial court properly determined that there was no evidence of a definite and clear promise to support a claim for promissory estoppel. Thus, the trial court did not err in granting summary disposition in favor of defendant Spence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto